

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

AUSTIN HOMES

DECISION OF THE HEARING OFFICER

Appearances: Beth A. Deragon Esq., Attorney for the Employer

Nature of Dispute: RSA 275-E:4 I Whistleblowers Protection Act

Employer: Austin Homes, 532 White Plains Rd, Webster, NH 03303

Date of Hearing: February 11, 2013

Case No. 44969

BACKGROUND AND STATEMENT OF THE ISSUES

A Whistle Blowers' Protection Act Claim was filed with the Department of Labor on December 3, 2013. The claimant testified that she participated in a "protected hearing" and was disciplined for "protected reporting". The claimant is seeking \$7,500.00 for six months of wages.

The claimant stated that she had presented her entire case in her written documents. She mentioned that in her filings she brought out the fact that at least eleven employees had left while she was working for the employer.

During cross examination the claimant went over her wages and the knowledge of the policies and procedures of the employer. She testified that some of the documents were reviewed with the management but there were some that she did not see or remember. The claimant also challenged her initials on at least one of the items.

The claimant stated that she knew she could go to the owners as part of the grievance procedure but she also stated that she had every right to contact the New Hampshire Ombudsman. The claimant said that she was told there would be fines for the employer's actions. She did not know if this was true or not.

The employer testified that they have had written Policies and Procedures since 2003. These documents are reviewed at hire and at least once a year with the employees. The employer always told the employees that they could use the grievance procedure or go to the New Hampshire Ombudsman at any time. In fact the employers testified that they did not know who talked with the Ombudsman until the current complaint came in from the Department of

Labor. The actual report from the State of New Hampshire did not come to the employer until after the claimant was terminated.

The owner testified that there were complaints about the language used by the claimant in the work environment. There were also documented incidents with the claimant's failure to document the use of medication.

In a review of the claimant's time cards it was learned that she was working on scheduled time off. In a meeting with the owner the claimant stated that she loved the residents but hated the owners. The claimant was discharged. The owner stated that the claimant was terminated because of her work product and not because of a then unknown Ombudsman report.

FINDINGS OF FACT

RSA 275-E:4 Rights and Remedies. –

- I. Any employee who alleges a violation of rights under RSA 275-E:2 or 3, and who has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment, may obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. Following such hearing, the labor commissioner or the designee appointed by such commissioner shall render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.

Decisions rendered by the commissioner of labor under paragraph I may be appealed pursuant to RSA 541.

This is the section of the law that protects employees from discipline or discharge when acting in a protected action.

RSA 275-E: 2 I (a) No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location or privileges of employment because: (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States;

This section protects an employee from reporting an alleged violation of law.

RSA 275-E: 2 I (b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law;

This section protects an employee when that employee participates in a hearing that came out of a complaint.

It is the finding of the Hearing Officer, based on the evidence and the testimony presented at the hearing, that the Whistle Blowers' Protection Claim is invalid.

The claimant has the burden to show that any action taken against her was because of her use of protected reporting avenues. The claimant did not bear this burden. The claimant's allegation that she was terminated because she participated in several protected activities is not found to be true.

The employer testified credibly that there were problems with the claimant's work product and that she was spoken to about these problems. The key areas were the reporting and handling of prescription medicine. There were also problems discussed with the claimant's workplace language.

The employer exercised their right to release an employee at any time, for any reason. The termination was not for a protected act under RSA 275-E 4 I.

DECISION

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive" analysis because of the direct evidence presented. Under this analytical framework, the claimant has the initial burden of persuasion. If the claimant meets this burden, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons. As long as the claimant can meet the evidentiary burden required by the "mixed motive" analysis, the burden of persuasion remains with the employer.

This did not happen, the claim is denied.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 12, 2013

Original: Claimant
cc: Employer

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